PP

v.

SYARIKAT TEKALA SDN BHD

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT JC
[SUIT NO: TS(87) 160/98]
26 MAY 2004

CIVIL PROCEDURE: *Trial - Institution and conduct of proceedings - Charges related to offences based on complaint lodged by officer of government department - Trial also conducted by officers of government department - Whether proceedings contravened art. 145(3) Federal Constitution - Whether trial rendered a nullity - Employees Provident Fund Act 1991, s. 68 - Criminal Procedure Code, ss. 128, 380(ii)(b)*

CONSTITUTIONAL LAW: *Attorney General - Power to institute, conduct or discontinue proceedings under art. 145(3) Federal Constitution - Whether institution of proceedings by officers of government department contravened art. 145(3) - Whether s. 68 Employees Provident Fund Act 1991 and s. 380(ii)(b) Criminal Procedure Code (prior amendment) void*

The charges against the respondent for offences under s. 43(2) of the Employees Provident Fund Act 1991 ('the Act') arose from a complaint lodged by an officer of the Employees Provident Fund ('EPF') Board. The trial before the magistrate was conducted by the officers of the EPF Board when on a preliminary objection taken by the respondent, the learned magistrate held that the proceedings were *ultra vires* art. 145(3) of the Federal Constitution ('the Constitution'). Hence, this appeal by the appellant.

The issues were: (1) whether the learned magistrate had taken cognisance of the offence under s. 128 of the Criminal Procedure Code ('CPC') and whether on that ground the proceedings against the respondent were properly instituted; and (2) whether s. 68 of the Act and s. 380 (ii)(b) CPC were void by virtue of art. 4(1) of the Constitution, being inconsistent with art. 145(3) of the Constitution.

Held (dismissing the appeal):

[1] The complaint lodged by the officer of the EPF Board clearly preceded the cognisance by the learned magistrate of the offences for which the respondent was charged. It followed that the complaint itself constituted the institution of the proceedings against the respondent and not the cognisance by the learned magistrate. The learned magistrate therefore could not be said to have instituted the proceedings. (p 305 g)

[2] The proceedings against the respondent were instituted and conducted by the officers of the EPF Board and founded on s. 68 of the Act and s. 380 (ii)(b) CPC prior to its amendment. It was clear from the authorities cited that s. 68 of the Act and s. 380(ii)(b) CPC prior its amendment were inconsistent with art. 145(3) of the Constitution and therefore void by virtue of art. 4(1) of the same. It was of no assistance to the appellant that the officers of the EPF Board were given written authorisation to conduct the prosecution of the respondent before the trial. (pp 306 e-h, 307 a-c & 309 a)

Case(s) referred to:
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Nguang Chan Sdn Bhd v. PP [2001] 2 CLJ 16 CA ***(foll)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(dist)***
PP v. Lee Ming & Anor [1999] 1 CLJ 379 HC ***(foll)***
PP v. Lim Shui Wang [1979] 1 MLJ 65 ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 68, 128, 377, 380(ii)(b), 418A
Employees Provident Fund Act 1991, s. 43(2)
Federal Constitution, arts. 121(1), 145(3)
Securities Commission Act 1993, s. 39(2)

For the appellant - Duncan Sikodol DPP
For the respondent - N Sivabalah (Lim Chi Wu); M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Linton Albert JC:
The respondent was charged for offences under s. 43(2) of the Employees Provident Fund Act 1991 (the Act). The trial before the learned Magistrate was cut short at the defence stage, when on a preliminary objection taken up by the respondent's counsel, Mr. N Sivabalah, the learned Magistrate ruled that the institution and conduct of the prosecution against the respondent was *ultra*

vires art. 145(3) of the Federal Constitution. The prosecution is now appealing against the decision of the learned Magistrate. It is probably useful to begin by setting out the facts relevant for the determination of this appeal.

A summons was issued against the respondent on 12 March 1998 relating to three charges under s. 43(2) of the Act and an additional four charges were included at the trial on 15 March 1999 under the same section of the Act. All the charges related to offences alleged to have been committed before April 1998. The charges against the respondent arose from a complaint lodged on 10 March 1998 by the Employees Provident Fund Board (The EPF Board) through one Margaret Soon Siew Kyun, an officer of the EPF Board. The trial which commenced before the learned Magistrate on 15 March 1999 was also conducted by the officers of the EPF Board. The issue, therefore, is whether the institution and conduct of the proceedings in respect of the charges against the respondent was a nullity.

Learned DPP, Mr. Duncan Sikodol contended that criminal proceedings against the respondents was properly instituted on the basis that the learned Magistrate had taken cognisance of the offence under s. 128 of the Criminal Procedure Code (CPC) which reads as follows:

> (1) Subject to the provisions of this code a Magistrate may take cognisance of an offence:
>
> (a) upon receiving a complaint as defined by this code;
>
> (b) ...
>
> (c) ...
>
> (d) ...

Clearly, the complaint lodged by the officer of the EPF Board preceded the cognisance by the Magistrate of the offence for which the respondents were charged. It follows, that the complaint itself constitutes the institution of the proceedings against the respondents and not the cognisance by the Magistrate. The Magistrate cannot, therefore, be said to have instituted the proceedings. Suffian, LP in *PP v. Lim Shui Wang* [1979] 1 MLJ 65 at p. 67 defined the word "institute" in art. 145(3) of the Federal Constitution thus:

> The word "institute"means to set on foot, initiate, start, so that the Attorney-General has power, at his discretion, to initiate a case such as the present ones.

In *Nguang Chan Sdn Bhd v. PP* [2001] 2 CLJ 16 Lamin b. Mohd. Yunus PCA had this to say:

> However by lodging a complaint as was done by the Assistant Controller, did not help to salvage the case in any way. By so doing it could be said he did institute the proceeding.

I do not feel compelled to follow, as learned DPP would want me to, the contrary view expressed in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284, Mohamed Azmi SCJ stated that:

> Criminal proceedings are in fact not instituted until the court has taken cognisance of the offence or offences under one or other of the clauses of subsection (1) of Section 128 CPC.

Dato' Yap Peng's case revolved around the constitutional validity of s. 418A of the CPC in relation to arts. 121(1) and 5(1) of the Federal Constitution. The passage set out above was a passing remark made by Mohamed Azmi SCJ in response to the learned DPP's misplaced reliance in that case on art. 145(3) of the Federal Constitution.

Dato' Yap Peng's case is, therefore, totally distinguishable from the matter before me. The *ratio decidendi* of the majority decision was that the judicial power conferred on the Attorney-General to transfer a case from a subordinate Court of competent jurisdiction to the High Court under s. 418A of the CPC was in violation of art. 121(1) of the Federal Constitution and was, therefore, unconstitutional and void under art. 4(1).

There is no doubt that the proceedings against the respondents was instituted and conducted by the officers of the EPF Board and founded on s. 68 (which had since been repealed by Act 1080/00) of the Act and on s. 380(ii)(b) (before its amendment on 1 April 1998) of the CPC. They read as follows:

Section 68 of the Act:

> Prosecutions in respect of any offence against this Act or of any regulations or rules made thereunder may be conducted by any officer authorized in writing in that behalf of the Chairman.

Section 380(ii)(b):

> Notwithstanding anything in this Chapter contained:
>
> (ii) in summary non seizable cases in the court of a Magistrate:
>
> (a) ...
>
> (b) any officer of any Government department or to any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce.

The constitutional validity of these two sections was challenged by the respondent as being inconsistent with art. 145(3) of the Federal Constitution and, therefore, void by virtue of art. 4(1). They read as follows:

> 145(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court martial.

Article 4(1):

> This constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

It is clear, from the authorities cited by learned counsel for the respondent, that s. 68 of the Act and the old s. 380(ii)(b) were unconstitutional. In *Repco Holdings Berhad v. PP* [1997] 4 CLJ 740, Gopal Sri Ram JCA declared s. 39(2) of the Securities Commission Act 1993 (SCA) to be void and unconstitutional as it wholly contravened art. 145(3) of the Federal Constitutional. Section 39(2) of the SCA reads as follows:

> (2) Any officer of the Commission authorized in writing by the Chairman may conduct any prosecution of any offence under this Act.

The position of the Chairman of the EPF Board in s. 68 of the Act is akin to that of the Chairman of the Securities Commission in s. 39(2) of the SCA. It is useful, therefore, to reproduce the relevant passages of His Lordship's judgment. They are:

At p. 746:

> It will be seen at once, from a reading of the plain language of Article 145(3), that the supreme law, namely the Federal Constitution, has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

And at p. 750:

> Neither does s. 380(i) of the Criminal Procedure Code, relied on by the prosecutors before the Sessions Court, provide any assistance to the Securities Commission. As pointed out by the learned Deputy, the expression "public officer" appearing in that section refers to members of the public service. While, for the purpose of carrying out their duties, members and servants of the Securities Commission are deemed to be public servants (s. 40 of the SCA), they do not fall within the scope of s. 380(i) of the Code.

The second authority cited by the *Mr. N. Sivabalah was PP v. Lee Ming &. Anor* [1999] 1 CLJ 379, Ian Chin J, had this to say:

> It is clear from the wording of s. 380(ii)(b), which I have earlier reproduced, that the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow from the decision of *Repco Holdings Bhd v. PP* that s. 380(ii)(b) is also unconstitutional and a nullity.

The third authority brought to my attention was the Court of Appeal case of *Nguang Chan Sdn Bhd v. PP* [2001] 2 CLJ 16 where Lamin b. Mohd. Yunus PCA delivering the judgment of the court said:

> The constitutional validity of this provision is questionable especially when the section (s. 380) if prefixed with the words 'notwithstanding anything in this Chapter contained ..." The effect of this is to oust the powers of the Attorney-General under s. 376(i) to control and direct all criminal prosecutions. Perhaps this is permissible. But more importantly it stands in the face of his general powers under Article 145(3) of the Federal Constitution and will immediately attract Article 4(1) of the Constitution.

Learned DPP cited a passage at p. 122 of the judgment of Ian Chin J in *PP v. Lee Ming & Anor* where his lordship expressed reservations as to the correctness of *Repco Holdings Berhad v. PP*:

> The conclusion of *Repco Holdings Berhad v. PP* can only be sustained if the word 'only' is added to make the relevant part of the clause to read: "Only the Attorney General shall have the power ...", or the word 'sole' is added so that it reads: 'The Attorney General shall have the 'sole' power." In my view, that the word 'only' or 'sole' is missing is demonstrative of the clear intention of the framers of the Constitution that the Federal Attorney General should not be the sole or any person to institute, conduct or discontinue any proceedings for an offence.

That passage does not, in my view, warrant a departure from *Repco Holdings Berhad v. PP* as learned DPP would have wanted because his lordship, despite having said that, did not go on to differ. Indeed, I must also be mindful, as learned counsel for the respondent urged, of what was said by Pen Swee Chin FCJ, in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

It is of no assistance to the appellant that the officers of the EPF Board were given written authorization to conduct the prosecution of the respondent on 4 March 1999, before the trial began on 15 March 1999. In the first place, the institution of the proceedings having been declared void, everything that follows would invariably suffer the same fate. Significantly, the written authorization was given after the amendment to s. 377 of the CPC came into force on 1 April 1998 and it is, therefore, painfully apparent that the amended s. 377 of the CPC pursuant to which the written authorization was given is irrelevant.

In the light of the authorities I have discussed and set out above I am of the view that the decision of the learned Magistrate was correct, and therefore, the proceedings against the respondents was null and void. The appeal is dismissed.